**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**NEWSPAPER AND MAIL DELIVERERS'**
**UNION OF NEW YORK AND VICINITY**
**(NYP HOLDINGS, INC., d/b/a NEW YORK POST**

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| **and** | **Case Nos.** | **2-CB-21740**<br>**2-CB-22366** |
| **STEFANI COTLER, AN INDIVIDUAL** | | |
| **And** | **Case No.** | **2-CB-21749** |
| **TERANCE BRIGHT, AN INDIVIDUAL** | | |
| **and** | **Case No.** | **2-CB-21762** |
| **MARC SUSSMAN, AN INDIVIDUAL** | | |
| **and** | **Case No.** | **2-CB-21826** |
| **REYSON PIMENTEL, AN INDIVIDUAL** | | |
| **and** | **Case No.** | **2-CB-21827** |
| **JESUS MEJIA, AN INDIVIDUAL** | | |
| **And** | **Case No.** | **2-CB-21828** |
| **CESAR CEBALLOS, AN INDIVIDUAL** | | |
| **and** | **Case No.** | **2-CB-21829** |
| **JOHN SMITH, AN INDIVIDUAL** | | |
| **and** | **Case No.** | **2-CB-21845** |
| **PATRICK FORTE, AN INDIVIDUAL** | | |
| **And** | **Case No.** | **2-CB-21905** |
| **SHIWU PENG, AN INDIVIDUAL** | | |
| **and** | | |
| **NYP HOLDINGS, INC., d/b/a NEW YORK POST**<br>**(Party to the Contract)** | | |
| **NEWSPAPER AND MAIL DELIVERERS'**<br>**UNION OF NEW YORK AND VICINITY**<br>**(CITY & SUBURBAN DELIVERY SYSTEMS, INC.)** | | |
| **and** | **Case No.** | **2-CB-21842** |

**ENRIQUE GRADOS, AN INDIVIDUAL**

**and** **Case No. 2-CB-21899**

**DJEVALIN GOJANI, AN INDIVIDUAL**

**and** **Case No. 2-CB-21931**

**CHRISTOPHER FABIANI, AN INDIVIDUAL**

**and** **Case No. 2-CB-21941**

**RICHARD ATKINS, AN INDIVIDUAL**

**and** **Case No. 2-CB-21946**

**RAIMOND MORAN, AN INDIVIDUAL**

**and** **Case No. 2-CB-22015**

**JOHN CASSARO, AN INDIVIDUAL**

**and** **Case No. 2-CB-22051**

**PATRICK RIZZOTTI, AN INDIVIDUAL**

**and**

**CITY & SUBURBAN DELIVERY SYSTEMS, INC.**
**(Party to the contract)**

**and**

**THE NEW YORK TIMES COMPANY**
**(Party in interest)**

**NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY (VARIOUS EMPLOYERS)**

**and** **Case No. 2-CB-22701**

**DANIEL ALTIERI, AN INDIVIDUAL**

*Olga C. Torres, Esq., Susannah Ringel, Esq.* and *Colleen Fleming, Esq*., Counsels for the General Counsel
*Dan Silverman, Esq.* and *Warren Mangan, Esq*. Counsels for the Respondent
*Michael J. Lebowich, Esq.* and *Corinne M. Osborn, Esq*., Counsels for the New York Times
*Elliot S. Azoff, Esq.,* Counsel for The New York Post

## DECISION

### Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York on various dates from September 19, 2011 to October 5, 2011. The charges and the amended charges in these consolidated cases were filed by the respective charging parties on various dates commencing in October 2008.

On January 26, 2011, the Acting Regional Director issued a Consolidated Complaint in Case Nos. 2-CB-21740, 2-CB-22366, 2-CB-21749, 2-CB-21762, 2-CB-21827, 2-CB-21828, 2-CB-21829, 2-CB-21845, and 2-CB-21905. These charges and the Consolidated Complaint based on these charges all relate the events and transactions involving the New York Post.

On January 26, 2011, the Acting Director issued a Consolidated Complaint in Case Nos. 2-CB-21842, 2-CB-21899, 2-CB-21931, and 2-CB-21941. This Consolidated Complaint dealt with a set of facts relating to a company called City and Suburban and the New York Times. This Complaint was later amended on April 25, 2011 and added three additional charges in Case Nos. 2-CB-219946, 2-CB-22015 and 2-CB-22051.

All of these charges and allegations arose out of the circumstance that a company called City and Suburban, a newspaper wholesaler, went out of business in late 2008. (City and Suburban will mainly be referred to as C&S). The delivery department employees of that Company, numbering about 500, which was a wholly owned subsidiary of the New York Times, were represented for bargaining purposes by the respondent union. (Herein called either the Union or the NMDU). In anticipation of the closing, the Union sought and made arrangements with the New York Times, (the parent corporation), to either offer the permanent employees or a class of regular part-time employees of C&S **(a)** a buyout of $100,000, **(b)** an arrangement where some of the employees would to be transferred to the payroll of the New York Times or **(c)** to receive severance pay. (The severance pay option was the least favorable to the employees). In addition, the Union sought and obtained the consent of some of the other union signatory companies, including the New York Post, to hire at least some of these C&S employees.

### The Contentions of the Parties

#### Issue I

In the context of the New York Post cases, the General Counsel alleges that a longstanding provision in the Hiring/Seniority clause of the collective bargaining agreement, (and predecessor contracts), relating to Group 2 employees is illegal on its face. The theory is that this contract provision gives automatic preference for daily job assignments at the Post to certain permanent and regular part-time employees employed at other companies having contracts with the NMDU, (union signatories), and who, for the most part, are union members, over a category of regular part-time employees of the Post who are classified in Group 3 and who are not eligible for union membership. It is noted, that this provision in the NMDU/Post contract is identical to almost all contracts that the Union has maintained with other employers

in the industry and the provision has been in existence for at least 40 years. [1] This priority preference has been in multiple successive contracts and the General Counsel alleges that its continued application within the 10(b) statute of limitations period is a continuing violation. A more complete description of the hiring/seniority practices will be described below.

With respect to the above, it should be noted that the collective bargaining agreements between the NMDU and the various employers including the Post do not explicitly state that any preference for hiring, job assignments or anything else is based on union membership or length of time that an individual has been a union member.

On the other hand, the contract clearly does set up a category of employees (Group 2), who are given daily preferences over non-union employees, with respect to hiring assignments based on the former's length of service with union signatory companies in circumstances where these employees are not part of a multi-employer bargaining unit. See *Seafarers International Union*, 244 NLRB 641, where the Board concluded that the General Counsel established a *prima facie* case that Respondent's implementation of a hiring hall referral system, in strict adherence to the seniority preferences and in tandem with the union security requirements upon signatory employers, unlawfully favored jobseekers who were union members over nonmembers and also required signatory employers to discriminate with respect to hiring.

If it is determined that the Group 2 hiring provisions in the Post contract is a violation of the Act, the remedy would be to require the NMDU to not enforce or to rewrite its collective bargaining agreement with the Post to eliminate the Group 2 preference entirely. Presumably, this would also form a precedent requiring the reformation of all contracts between the NMDU and other employers having the same or substantially similar contract provisions. A remedy might also require the Union to make whole any employees of the Post who lost job opportunities because of the Group 2 hiring preference. However, any backpay would be limited to a period starting from six months prior to the filing of the charges.

**Issue II**

Another allegation in the New York Post cases involves the contention that in January 2009, about 50 employees of the closed City and Suburban (C&S), who opted for job transfers, (instead of the buyouts), were hired by the Post, (with the latter's agreement), and were given seniority preferences over a category of existing New York Post part-time employees who were not union members at the time. It is alleged that this preference that was acceded to by the Post, was based on the fact that the employees transferred from C&S were either union members and/or were employed in union signatory shops, as opposed to the particular group of adversely affected Post employees who were not eligible for union membership. Because the Post and the C&S bargaining units were separate and distinct, the General Counsel alleges that this preference was unlawful and that the Union, by entering into such an agreement with the Post, caused or attempted to cause the Post to discriminate against employees who were not union members. Or put in a different way, to discriminate in favor of individuals who were union members or who had worked in shops having a collective bargaining agreement with the Union.

If the General Counsel is successful in proving its case in relation to the Post, one aspect of the remedy would be that employees who were employed by the Post before the

[1] An exception involves a predecessor company of C&S, (Imperial Delivery), that had negotiated a separate contract with the NMDU and had been successful in eliminating the hiring/seniority provision in the typical contracts that the NMDU made with other employers in the industry.

transfers and who were passed over in terms of Post seniority, should bump all of the employees of C&S who were hired by the Post. To the extent that it is shown, either in the principle case or in a compliance setting, that some of the disadvantaged employees did not receive work because of their lower rank, the Union would be liable to make them whole for lost income or benefits. (No charges were filed against the Post and therefore the company is not a party defendant to these actions. Accordingly, it would not be liable for damages or subject to any mandatory affirmative relief.)

**Issue III**

The allegations involving C&S and the New York Times also arise out of the events that transpired in anticipation of and after C&S went out of business.

As noted above, C&S was a wholly owned subsidiary of the New York Times. In anticipation of its closing, the Union and the Times entered into an agreement that provided for the following. The permanent employees of C&S, (as opposed to any casual employees), were offered three choices. A buyout in the amount of $100,000 was offered to 140 employees and the opportunity to make this selection was based on a form of seniority represented by what is called an industry wide priority number. This, as will be explained later on, is not necessarily the same as the seniority date for the employees of C&S and in some cases may be older. For many of the older employees nearing retirement, the buyout was the optimal choice and ultimately there were 140 C&S employees whose choice for this option was initially granted. The Times also offered 65 positions on its own payroll for those individuals who opted for that choice. Again, the employees were selected on the basis of their industry wide priority numbers instead of their seniority with C&S. Finally, for the remainder, who neither had the requisite low priority number to obtain one of the 140 buyouts or one of the 65 transfers, they were relegated to a rather meager severance pay package.

Without going into all the details, it is the General Counsel's theory that this agreement with the Times that was made in late 2008 and implemented in January 2009, was unlawful and that the Union violated Section 8(b)(2) because it caused the Times to utilize a method for selecting employees for buyouts or transfers based not on their actual seniority with C&S, but based on their total length of service in the industry including their employment with other employer's having collective bargaining agreements with the Union.

If the General Counsel is successful in proving the above allegations, the remedy would require the Union to recalculate the list of people who chose and were selected for the buyouts and/or the transfers. The Union would then be required to present the new lists to the Times which would be asked to make the payouts based on their seniority status with C&S and not based on the lowest industry wide priority numbers. If the Times refused to make the payments pursuant to the revised order, the Union would then be liable for the money. In this case, the Times had held back payment to the last six individuals on the buyout list pending the outcome of this case. Thus, it is possible that some or all of these individuals will get the money and that another group of individuals will not.

A subset of this issue is whether within the group of former C&S employees hired by the Times, their relative seniority *vis a vis* each other was improperly determined.

**Issue IV**

There is an alternative allegation in the New York Times cases involving three employees named Grados, Atkins and Gojani. The General Counsel claims that these three

individuals should have had their buyout bids accepted because they should have been given lower industry wide priority numbers than the ones that they actually received. It also is claimed that when requested to change their numbers within the 10(b) period, the Union refused to do so for arbitrary or invidious reasons.

I must confess that I am not sure what the General Counsel proposes should be their correct numbers. The evidence seems to point to the fact that numbers were assigned to them as of the time that they received promotions at C&S to regular situation holder status, which would be consistent with the Union's longstanding practice.

The General Counsel pointed to *Newspaper & Mail Delivers' Union of New York (City and Suburban Delivery System),* 332 NLRB 870 (2000), where the Board concluded that the Union caused C&S to refuse to promote, in 1998, three other individuals, (Eduardo Valentin, Jimmy Clark and Willie Miles), to permanent regular situation holder positions because they either were or were perceived by the Union to be strike breakers in 1992. I may be mistaken, but it seems that the General Counsel is implying that Grados, Atkins and Gojani, who also were strike breakers at the same time, should be placed in the same shoes as Valentin, Clark and Miles. But the Board's decision in that case only included the three charging parties in the Remedy and since that case has been closed for a good long time, the Respondent could argue that the General Counsel is improperly attempting to re-litigate the prior case on behalf of a new set of charging parties.

**Issue V**

The Complaint alleges violations of the Act under *Communications Workers of America v. Beck*. 487 U.S. 735 (1988). Basically, the Complaint alleges that employees have not been given adequate notice of their rights to refrain from joining the Union and that the agency fees should not be required on nonmembers.

**Issue VI**

The charge filed by Daniel Altieri, (Case No. 2-CB-22701), asserts that on August 6, 2010, the Union, by letter, threatened him with loss of employment with any union signatory employer because he was in arrears on his union dues at C&S.

**A summary of the arguments by the General Counsel and the Union**

The Union does not contest the fact that it sought and obtained agreement by the Post to give the full time employees and a category of regular part-time employees of C&S certain preferences over certain part time employees of the New York Post. There is also no question but that as a result of this preference, the transferred C&S employees thereby enjoyed certain benefits over the pre-existing non-union Post part-time employees in terms of job selection, vacation selection, etc.

Nor does the Union contest the fact that among the former employees of C&S, the closing agreement with the Times affected their ability to choose buyouts and/or job transfers. Thus, some employees who had more seniority with C&S were passed over by some other employees of C&S who had lower industry wide priority numbers, meaning that they had worked longer in the "industry." Coincidently, as priority numbers generally are given out at the time that an employee becomes eligible for union membership, (and for the most part such employees join the union), the priority number will in almost all cases correspond to the date

that an individual becomes a union member. (There are a very few exceptions which will be discussed below).

The Union argues that in accordance with the terms of its collective bargaining agreements with the Post and the Times, both companies had agreed that in the event that if any of a named group of companies, (all having contracts with the Union), went out of business, then the remaining employers would give preference in hiring to certain employees of the defunct company and upon hire, place those people ahead of certain casual employees that were already employed by the acquiring employers. In this respect, the Union argues that it is or should be legal for it to make an agreement with unionized employers whereby a system of industry wide "seniority" is used to determine how to manage a situation where a large number of employees at a union signatory company lose their jobs when that company goes out of business. The Union contends that the preferences were *not* based on whether individuals were union members or on their length of union membership, but rather on their length of service within the "industry." I do note however, that when the Union uses the word "industry" it is referring only to companies that have collective bargaining agreements with the NMDU. Excluded from its definition of the "industry" are any companies that deliver newspapers or magazines within the same geographic area but whose employees are not represented by the Union. And in this connection, it is apparent from the record that such companies do exist and have been utilized by the Post in the past.

Moreover, the Union's definition of the "industry," which limits it to companies who only deliver newspapers and magazines could be construed artificial in itself. The essential function of this group is to deliver a physical product from one place to another, utilizing trucks. As far as I can see, the work here does not involve any kind of specialized knowledge or skills. There are, no doubt, tens of thousands of people in the greater New York Metropolitan area who have Commercial Drivers Licenses and who drive trucks for thousands of companies that do not have contracts with the NMDU. Thus, the universe of potential employees who could do this work is huge and all of these people, if they seek work at the Post, would be at a disadvantage *vis a vis* any person who was a steady employee at an NMDU signatory company other than the New York Post and who was in the Group 2 category. And as noted above, people in the Group 2 category are and have been, with the most minor of exceptions, NMDU members.

The General Counsel counters that even if the arrangements made in late 2008 were based on industry seniority, that measure of seniority, (in the form of industry wide priority numbers), was based on an employee's length of service with union signatory companies. While agreeing that the use of a form of industry wide seniority might have been appropriate if it were applied to employees within a multi-employer bargaining unit encompassing C&S, the New York Times and the New York Post, the General Counsel argues that by the time of the events in this case, none of these companies bargained through a multi-employer association and neither the employees of the Times, the Post, nor C&S were part of any multi-employer bargaining unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following [2]

## FINDINGS AND CONCLUSIONS

### I. Jurisdiction

[2] The unopposed Motion to Correct the transcript filed by the General Counsel is hereby granted. See Appendix A.

The parties agree and I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act. It also is agreed that the New York Times and the New York Post are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It therefore is concluded that the actions by the Respondent union would affect commerce within the meaning of the Act.

## II. The Facts

There is little or no dispute about the facts in these cases. The basic facts are well known and the different positions of the parties relate to what inference can reasonably be drawn from those facts and how the law should be applied.

### (a) A Bit of History

The Union has been in existence from the beginning of the 20th century and has represented in the New York Metropolitan area, employees who have been delivering newspapers and magazines. [3] These employees, who basically work as truck drivers, have been employed either directly by publishers, such as the New York Times, the Daily News, the Post and a variety of other smaller or now defunct newspapers, or by a group of relatively small companies that perform delivery services for the publishers. The latter enterprises are called wholesalers.

For many years, the Union has represented these types of employees in two major multi-employer associations. The Publishers' Association of New York City essentially was an association of newspaper publishers that bargained collectively on behalf of its employer members with respect to their delivery department employees. At one time or another, the New York Times and The Post were members of this association. The other major association was the Suburban Wholesalers' Association which represented a group of wholesale delivery companies.

There also have been some publishers, such as the Daily Forward, that have always bargained separately from any association.

At the time that the events in these cases transpired, both multi-employer associations had become defunct and the there no longer existed any multi-employer bargaining units.

The nature of this industry is that the Employers have tended to employ a group of regular employees, (mostly men), who work day in and day out throughout the year. These people are called regular situation holders and are sometimes referred to in the contract or other documents as RHSs. However, the practice has been that employers have, at times, also tended to employ extra employees who shape up for work and who are given assignments on a daily basis when the regular work force is insufficient to get the newspapers out.

The other basic tendency regarding employment in this industry is that there has been a significant degree of nepotism whereby the sons of current employees and union members

[3] The employees represented by the Union have been employed by a variety of companies within a geographic area consisting of the City limits of New York City, and all territory within a radius of about 50 miles from Columbus Circle. This area includes Long Island, parts of New Jersey, parts Westchester and portions of lower Connecticut.

have had a big leg up in obtaining employment and preferred seniority status. See Judge Pierce's Decision in *Patterson v. NMDU et al*, 384 F. Supp. 585 (S.D.N.Y. 1974).

In or about 1952, the Union convinced all of the employers with which it maintained contracts to set up a hierarchal structure for hiring extra employees. [4] Thus, each employer would have a group of steady employees that were called regular situation holders and would also be required to employ extras within a defined structure. The extras were divided into four categories as follows:

**Group 1**. Until 1974, this group consisted of persons who once had regular situations in the industry. That is, anyone who at any time had been employed as a regular situation holder by any employer within the Greater New York Metropolitan area that had a collective bargaining agreement with the Union. Each union signatory publisher or wholesaler maintained its own Group 1 list and the individuals on that list would generally have first crack at delivery jobs that were available on any given day in the order of their seniority on the Group 1 list.

After 1974, the Group 1 list was changed to include former Regular Situation Holders who had lost their regular situations or Group 1 status at another NMDU signatory employer within the industry. [5]

**Group 2**. The people on the Group 2 list consist of individuals who are employed by *any* union signatory employer within the Greater New York Metropolitan area and who either are employed by those companies as regular situation holders or have been employed as Group 1 extras by those companies. The Group 2 list is an industry wide list that is compiled by the Union and this is unlike the Group 1 lists that are maintained separately by each employer. People on the industry wide Group 2 list are entitled to shape for extra work at any signatory company and be accorded the next highest preference after all people on the particular employer's Group 1 list have been exhausted. Relative seniority on the Group 2 list depends on when an individual first was promoted to a Group 1 list. Because an individual almost invariably becomes a union member and given a union number at the same time he is promoted to a Group 1 list, his place on the Group 2 list is coextensive with the date that he because a union member. (Except for the very rare instance where a person may have decided not to become a member and opted to pay an agency fee instead).

**Group 3**. The people on this list are those individuals who regularly shape for work at a particular employer and who obtain regular work over a given period of time. [6] Each employer maintains its own Group 3 list and the people on that list could be described as regular part-time employees of that particular employer. The individuals on an employer's Group 3 list will obtain work by their particular employer after that company's regular situation holders go out; after the Group 1 list has been exhausted; and after anyone who shows up for work and who happens to be on the Union's Group 2 list has been sent out to work. People on the Group 3 lists generally have seniority within that list and within the particular company that employs them. Unlike

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[4] At that time, the Union dealt with employers within a multi-employer bargaining context and it thereby was far easier to reach agreements affecting multiple employers.

[5] It is significant to me that it is agreed that when the word industry is used by the parties they mean to include only employers that utilize delivery employees within the Greater New York area *that have collective bargaining agreements with the Union*.

[6] For an individual to maintain his Group 3 status, he is required to work 5 days/nights per week and shape 6 days/nights per week. The people on any employer's Group 3 list, therefore cannot by any stretch of the imagination, be described as casual employees.

employees who are regular situation holders or on Group 1 lists, (and who therefore also have Group 2 status), people on a Group 3 list are prohibited from becoming a union member although their conditions of employment are defined by whatever collective bargaining agreement the Union has with their employer. Also, although barred from union membership, people on Group 3 lists are required to pay regular fees to the Union.

As employees who are regular situation holders leave their employers for retirement, illness etc., employees who are on that employer's Group 1 list will move up to fill the spaces of those regular situation holders who leave. This then makes space for additions to the employer's Group 1 list, and often, but not always, those openings are drawn from individuals on that employer's Group 3 list as mutually agreed to by the Union and the employer involved. Upon being elevated from an employer's Group 3 list to that employer's Group 1 list, the employee, under the terms of the collective bargaining agreement's union security clause, is required to become a union member. (At some point, it was recognized by the union that the union security clause could not require actual membership; albeit the Union could require the payment of reasonable fees). As a practical matter, the evidence shows that with extremely rare exceptions, the people who are promoted from Group 3 to Group 1 status invariably and simultaneously become union members.

**Group 4**. People in Group 4 are true casual employees and if a company even chooses to have a Group 4 list, the individuals on this list are given work as a last resort. Like people on a Group 3 list, people on a Group 4 list cannot become union members although their wages and conditions of employment are determined by the relevant contract with the employer from whom they seek work. For purposes of this case, the Group 4 provision of the contract is not relevant as there is no contention here that any people in this category were discriminated against.

As noted above, although there never was a single multi-employer bargaining unit comprising all of the New York publishers and/or wholesalers, a good many of the employees represented by the Union, either as regular situation holders or as members of one of the extra groups, were employed by companies that in the past were members of two major employer associations. However, this changed when those associations ceased to exist as bargaining organizations. Therefore, whatever multi-employer bargaining units that may once have existed, have long since been disappeared.

In 1973, the EEOC sued the Union and most or all of the publishers and wholesalers having contracts with the Union. Additionally, a class of minority persons sued the Union and the employers, claiming racial or ethnic discrimination in terms of hiring practices in violation of Title VII of the Civil Rights Act of 1964. These cases were consolidated and were tried before a Judge of the United States District Court.

After four weeks of hearings, a settlement was reached and executed by the Union and the defendant employers, including the New York Times and the New York Post. Notwithstanding some objections by some of Union's members, the Judge issued a decision approving the settlement. This is reported as *Patterson v. Newspaper and Mail Deliverers' Union*, 384 F. Supp. 585 (S.D.N.Y. 1974) affirmed 514 F.2nd 767 (2nd Cir. 1975). In reviewing the settlement, the Court of Appeals stated:

> Although the Union represents all delivery workers, membership is limited to Regular Situation holders and Group 1 members. Historically the Union has excluded minorities and has limited its membership to the first born son of a member. Aside from the chilling effect which restriction of union membership to

> whites might by itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group 3 lists, even though Group 3 shapers are not members of the union…
>
> While the current group Structure, which was adopted in 1953, appears on its face to open Union membership to anyone in the labor force, union membership, because of lax administration of the contract provisions, has largely remained attainable only by the family and friends of a union member. Due to the artificial inflation of the Group 1 lists, no person has in practice made the theoretically possible jump from Group 3 to Regular Situation since 1963. The evidence suggests that this expansion of the Group 1 lists has been accomplished primarily by use of voluntary transfers of Group 1 or Regular Situation holders from the lists of smaller distributors to the Group 1 lists of more desirable, larger employers and ultimately to Regular Situations there. Other devices include fictitious lay-offs, enabling the Union member to transfer to Group 1 of a different employer and outright false assertions of Group 1 status by persons who have obtain union membership cards, the validity of which have not been challenged by employers.

Among other things, the settlement required that the Group 1 definition and the Group 1 promotion procedure be revised so that a regular an orderly number of Group 3 people would be promoted to Group 1 status. It also provided that an outside administrator would be appointed to monitor the process and resolve disputes.

The Union contends that the Board should defer to the EEOC settlement which allowed the Union and the signatory employers to retain, with slight modification, the Group Extra system that was contained in its contracts with employers, many of whom were then in multi-employer associations that no longer exist. The General Counsel contends and I agree that the Title VII settlement, while interesting because of the Court's description of the Union's history and industry hiring practices, cannot be binding on the NLRB which was not a party to that action. Moreover, the issues in that case involved claims of racial and ethnic discrimination and those are a completely different from the issues that are presently before the Board. That the Union and signatory employers may have resolved claims of racial or ethnic discrimination is admirable; but that resolution has nothing to do with the claims herein that the Union has discriminated in favor of union members and against individuals on the basis of their lack of union membership.

**(b) The New York Post Cases**
**(Exclusive of the Beck issue)**

The New York Post is a newspaper published by NYP Holdings Inc. which is a division of the News Corporation. Its printing facility is located in the Bronx where it also prints the Wall Street Journal, Barron's and a bunch of smaller community newspapers. The delivery of publications produced at the Bronx facility is done by people directly employed by The Post and they are represented by the Union. As described above, the delivery department employees are either regular situation holders, having permanent positions, or extra workers divided into Groups 1, 3 and 4. All extra employees, (apart from Group 2 people who are employed at other companies and who may occasionally shape at the Post), are people who seek work assignments at the Post. In the case of Group 1 and Group 3 extras, these individuals are most accurately described as regular part-time employees of the Post. (Group 4 shapers have a more tenuous relationship to the employer). I note that because of a steady diminishment of the newspaper industry, the Post by 2011, no longer had or utilized a Group 3 or Group 4 list.

At one time the Post had been a member of the Publisher's Association and had maintained its collective bargaining relationship with the Union through that multi-employer association. It was during that time that the hiring provisions of the contract were established. It could be said that these contractual provisions were at one time, applicable to employees in a multi-employer bargaining unit consisting of various publishers such as the Post and the New York Times.

The 1973-1975 collective bargaining agreement between the Union and the Publishers Association was the last contract to which the Post was a party. In 1975, the Post bargained separately with the Union and subsequently reached a separate collective bargaining agreement covering its own employees.

In 1984, the Publishers Association ceased to function as the bargaining agent for its employer members and thereafter, all surviving publishers negotiated separate collective bargaining agreements with the Union.

The current contract between the New York Post and the NMDU is based on a 2003-2010 agreement as modified by subsequent memoranda of understandings in 2006 and 2008. The 2008 memorandum of understanding extended the expiration date of the contract to December 15, 2015.

During the 2003 negotiations, the Post and the Union agreed to create a new Group 1 and Group 3 list. [7] The Union, though its Business agent Initially, Thomas LoDico, sent the Post a proposition that 18 people be included on a Group 1 list, 12 of whom would be based on their length of service in the industry as determined by their union card numbers. He also proposed that 6 persons be chosen for the Group 1 list based on their seniority as casual employees and who had worked 50 or more shifts at the Post in 2003. This union proposal was accepted by the Post and an entity called the Adjustment Board, (jointly staffed by employer and union representatives), approved the placing of these 18 individuals on the Post's Group 1 list. [8]

As of 2003, the Post employed about 184 regular situation holders and the contract allowed that number to be reduced by attrition to 170. In 2006 and 2008, the parties agreed to increase the number of regular situations holders respectively to 193 and 204. In the event that regular situation holders retired or died, their spots would be taken by promoting individuals, in order of seniority from the Post's Group 1 list. And this is what happened over time; with regular situation holders retiring, Group 1 persons were being promoted to those jobs and new people were being placed on the Post's Group 1 list.

[7] For reasons not in the record, it seems that for a period before 2003, the Post did not have a Group 1 or Group 3 list.

[8] While it is clear that 6 of the individuals chosen for the new Group 1 list were people who had worked on a regular basis for the Post in 2003, it is not clear to me where the other 12 people came from. I am not sure if they were extra workers who also worked on a regular basis at the Post or if they were people who normally worked at other union signatory employers and who wished to work at the Post as Group 1 regular part-time employees. In any event the evidence establishes, primae facie, that in 2003, at least 12 people were chosen by the Union and the Post to be placed on the Post's newly established Group 1 list based on their union membership seniority. This, however, was outside the statute of limitations period set forth in Section 10(b) of the Act.

It should be noted that as vacancies on the Post's Group 1 list became open, they sometimes were filled by people on the Post's Group 3 list and sometimes by people who were employed at other employers who already were NMUD members and who apparently wanted to switch their employment to the Post. For example, General Counsel Exhibit 12 is an Adjustment Board order dated August 2004 that shows that when six individuals as on the Post's Group 1 list were elevated to become regular situation holders, another group of six people were elevated to the Post's Group 1 list. Four of those people already were members of the NMDU and the other two were Group 3 employees who had worked 180 shifts or more during 2003-2004 at the Post. This means that four people who were not extra employees at the Post but who were employed at other companies and were union members, were given preference over the employees on the Post's Group 3 list who were not union members.

Similarly, General Counsel Exhibit 13, dated April 13, 2005, shows that when one person on the Post's Group 1 list was elevated to being a regular situation holder, George Holtzer was placed at the bottom of the Post's Group 1 list based on the fact that he was the recipient of a "Father/Son card" and as such was a member of the NMDU in good standing with "no shop." The exhibit therefore shows that Holtzer, simply by virtue of his union membership bumped everyone on the Post's Group 3 list. [9]

The current contract between the New York Post and the Union contains a union security clause that requires Post employees who are employed as regular situation holders or as Group 1 employees to become or remain members of the Union no later than 30 days after they attain such status. The provision provides that retention of membership is a condition of employment.

As noted above, individuals who are in Group 3 or Group 4 status are not permitted by the Union to obtain membership status even if, as in the case of Group 3 extras, they work on a regular basis. They are however, covered by the terms of the contract and are required to pay an agency fee as a condition of working for the employer.

The 2003 contract also contained a side letter dated October 29, 2003 which is also a provision that is contained in other contracts that Union has with other employers. This letter states:

> If the Daily News, Newark Star Ledger, Hudson News Company, El Diario, Wall Street Journal, Jersey Journal, the New York Times, City and Suburban Inc., or Oggi cease operation, the New York Post shall add to its Group 1 list RSHs and bona fide Group 1 Extras who, through no fault of their own, lose their employment as a result of the cessation of operation and who meet the New York Post's reasonable qualifications in a number equal to the new York Post's pro rata share of the total number of RSHs employed pursuant to NMDU contracts. After such placement on the Group 1 list, the Group 1 list may once more atrit to 10% of the RSH list.

By early 2008, it was becoming apparent to everyone that the side agreement described above might be put to use as there was a distinct possibility that a company called City and Suburban, (C&S), that was owned by the New York Times was likely to go out of business in the near future.

[9] Other exhibits indicate that after 2005, additions to the Post's Group 1 list came from employees who were on the Post's Group 3 list.

At a later point I will describe in more detail the history of C&S. But for now, it is sufficient to say that C&S, as of 2008, was a wholly owned subsidiary of the New York Times and was engaged in the wholesale delivery of newspapers and magazines throughout the New York Metropolitan area. It was, at this time, the result of a conglomeration of smaller companies that had been purchased by the Times and it employed over 350 delivery department employees as regular situation holders or Group 1 extras. These employees were all represented by the NMDU under a separate collective bargaining agreement and therefore constituted not only a separate bargaining unit from any other employer but also a separate bargaining unit from the group of delivery employees that were directly employed by the Times.

Also in 2008, the Post began to feel a need to add additional people to its Group 1 list. Therefore, on July 9, 2008, the Post wrote to the Union and stated:

> We have a substantial number of openings on the One List. The contract provides that the One List will be maintained at ten percent for the RSH List. I would request a meeting of the Adjustment Board to elevate employees from the Three List to fill the vacancies and bring the Company into compliance with the contract. If the Union continues to refuse to meet to elevate employees because of a citywide freeze on issuing new Union cards, please confirm that fact.

The Union's response dated July 10, 2008 was as follows:

> In reply to your July 9th, 2008 letter concerning both of our compliance with the New York Post's One List being maintained at 10%, please be advised that there is an industry wide "Freeze" on all One Lists, not just the New York Post.
>
> In no small part based on the New York Post removing its product from City and Suburban's Lake Success facility, as well as the Hauppauge facility, as well as economic uncertainty through our industry, we, the Union, see no need to fill these vacancies on the One Lists throughout the industry at this time.

It is obvious to me that in responding to the Post's request, the Union wanted to keep the Post's Group 1 list, (and the Group 1 lists at other union signatory companies), unfilled because it and everyone else was aware that City and Suburban was going out of business and therefore, the Union was going to make an effort to have the C&S employees placed elsewhere.

One of the effects of the Union's freeze on adding to the Post's Group 1 list was that employees on Post's Group 3 list were denied an opportunity to be promoted to the Post's Group 1 list. This meant that individuals on the Post's Group 3 list were subject to losing potential job assignments to people who were on the Union's Group 2 list, which as noted above, is a separate list generated by the Union and consists of all delivery employees working for all union signatory employers within the Union's geographic jurisdiction. As noted above, seniority standing on the Group 2 list is based on the date that an individual becomes eligible for union membership because he or she was promoted to a signatory employer's Group 1 list. The person with the lowest number on the Group 2 list has the most seniority on that list.

C&S closed its doors in the first few days of January 2009. And pursuant to the side letter described above, the Post agreed to employ a number of people who had lost their jobs at C&S. There were discussions between the Post and the Union regarding how this would be accomplished and who would be hired. In February 2009, an agreement was reached and

memorialized in an "order" of the Post/NMDU Adjustment Board dated February 18, 2009. This stated in pertinent part:

> NOW THEREFORE, the Adjustment Board, having met for the purpose of placing displaced City and Suburban Inc. RSHs who lost employment as result of the Employer's cessation of employment on the Post's One List and to formalize its WSJ [10] One List does determine as follows:
>
> 1. The Post's One List will be expanded to include those named on Exhibit A in the order shown in compliance with the contractual side letter. It is further understood that the foregoing individuals on Exhibit A have been elevated one at a time in the priority listed on the Exhibit.
>
> 2. Each of those individuals listed on Exhibit A will be warned that they must shape 6 shifts per week or work 5 shifts per week in order to retain such listing.
>
> 3. Any individual who does not shape 6 shifts per week or work 5 shifts per week will on a 4 week basis be warned on his failure to comply with the contract. A second occurrence with a 12 month period will result in immediate removal from the One list.

Exhibit A contains 75 names and is described as the Post's Group 1 list. In this regard, the evidence was that 75 former employees from C&S applied and were accepted by the Post but that there were 25 individuals who failed to show up. Therefore, what seems to have occurred is that 50 individuals who had previously been employed by C&S, all or almost all of whom were union members were placed on a new Post Group 1 list. [11] For purposes of this case, the salient fact is that the set of C&S employees who were hired by the Post and placed on the newly expanded Group 1 list bumped all of the people who had been employees on the Post's Group 3 list, many of whom remained on that list. Moreover, even as to those individuals who were promoted from the Post's Group 3 list to the newly established Group 1 list, they were placed in lower seniority status than the displaced individuals who were hired from C&S. The criteria used to establish seniority within the new Post Group 1 list was the union's industry wide number, which as noted above, is a number that one gets from the Union when an individual becomes eligible for union membership. And because most or all of the people who came from C&S had been employed for many more years in union signatory shops, they were given greater seniority standing than the employees who were on the Post's Group 3 list and who either remained on the Group 3 list or were promoted in February 2009 to the new Post Group 1 list. As pointed out by the General Counsel, the relative seniority position of people on the

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[10] WSJ refers to the Wall Street Journal

[11] In accordance with the Decision in *Beck*, the Union issued a notice to its members through its publication that the union security clauses in various contracts did not actually require union membership. This was published on one occasion in 2003 and was not republished thereafter. It therefore is possible that the small number of individuals who have worked in Union shops have either not become members or given up their membership after receiving this notice. There is evidence that as of January 2008, there were about 2700 people employed at employers having NMDU contracts and that at least 95% of them were union members. The evidence also shows that as of August 2011 there were over 1000 employees working in NMDU contract shops, of which fewer than ten were not union members. See Respondent Exhibit 25. Moreover, of the people who have worked in NMDU signatory shops, there is a small category of people who although not members, have been denied membership because they admitted that worked at one time at a company having an active dispute with the Union.

Post's Group 1 list not only affects the order in which people are assigned to daily jobs, [12] but it also affects other aspects of their work, such as vacation preferences. [13]

The evidence also shows that in 2010 and 2011, the Post promoted a number of employees from its Group 1 list to regular situation holders. All of these individuals were former C&S employees, who as noted above, were afforded greater seniority than existing Post employees despite the fact that the Post employees had worked longer at the Post than the newly hired C&S employees. This obviously adversely affected the employees of the Post who did not come from C&S. [14]

Another example of where Post Group 3 employees were adversely affected was in an Adjustment Board "order" dated August 17, 2010 where the Post's Group 1 list was augmented by a number of people and where former C&S employees, (having more union seniority) were placed ahead of three Group 3 employees who were promoted, but to the bottom of the Post's Group 1 list. [15]

**(c) The C&S/New York Times Cases**

The New York Times originally created City and Suburban by purchasing, over time, four wholesale distributors. In 1992 it purchased Metropolitan News Company and the Newark Newsdealer Supply Company. In 1996 it purchased Imperial Delivery Service and another company called Raritan Periodical Sales Company. All of these companies employed delivery employees who were represented by the NMDU. And when these employees were incorporated into C&S, the collective bargaining agreement between the NMDU and C&S contained the same provisions. These contracts also contained the same union security provisions in relation to regular situation holders and Group 1 extras and the same agency fee provisions relating to all other extras.

At one time, some of the acquired wholesalers were members of the Suburban Wholesalers' Association an organization that represented its employer/members in bargaining with the NMDU. Nevertheless, by the time C&S was created, this Association had ceased to exist and C&S negotiated separately with the Union. In fact, before 1999, C&S negotiated two separate if similar collective bargaining agreements with the Union; one covering the employees of Newark Newsdealer and Metropolitan News and the other for the former employees of Raritan. As to Imperial, C&S assumed the existing contract between that company and the Union. It was not until 1999 that a single overall contract was made between C&S and the Union and this agreement was in effect until March 30, 2008. It thereafter was extended by the parties until March 30, 2020.

Unlike the publishers, C&S's contact provided for two categories of delivery department employees; regular situation holders who were guaranteed five shifts per week and extras.

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[12] Work is assigned on a daily basis first to the regular situation holders and then to Group 1 people in their order of seniority on that list. As noted above, if a Post Group 3 person had not been promoted to the Group 1 list in February 2009, he or she would be subject to being bumped for a job assignment by any person who showed up and was on the Union's Group 2 list.

[13] After February 18, 2009, the Post Group 1 list was slightly modified and additional people were added to the Post Group 1 list on August 5 and 7, 2009 and on January 10, 2010. See General Counsel Exhibits 23, 24 and 25.

[14] This is reflected in General Counsel Exhibit 29.

[15] This is reflected in General Counsel Exhibit 26.

Seniority for regular situation holders was determined by what is called a "make steady date." This is the date that an employee became a regular situation holder with C&S *or* with one of the predecessor companies that C&S acquired. This is not the same seniority date that is used when individuals become union members and acquire a union "industry wide priority numbers." At C&S, there were separate seniority lists. One was for the New Rochelle and Moonachie facility, (Westchester); a second was for the Edison and Wall facilities (New Jersey) and the third was for the Lake Success and Hauppauge facilities (Long Island).

The situation was somewhat complicated for employees who had previously worked for Rockland County News employees because many were transferred from their facility to the New Rochelle facility. Although the Union and C&S agreed to merge the seniority of the two groups of employees, there was a dispute as to how to accomplish that result. Accordingly, the issue was placed before an arbitrator who, pursuant to an award issued on January 1, 2002, decided that the employees who were on the Rockland County seniority list should be dovetailed with the employees who were on the New Rochelle seniority list. [16] In accordance with the award, an individual's seniority status at the consolidated facility was then determined by the date that the driver became a regular situation holder at the facility that he had worked at before the two facilities were merged. In reading the award, the principle dispute was whether the seniority lists should be dovetailed or end tailed. Although there was a contention that an individual's industry wide priority number, (i.e. his total length of employment with union signatory employers), should be the basis for determining seniority, this contention, at least as it appears from the arbitrator's decision, does not seem to have been seriously argued and was rejected.

As in the case of other NMDU signatory employers, when C&S needed to utilize employees after exhausting its regular situation holder list, it referred employees to job assignments by the aforementioned Group 1 and 2 complements, plus another more amorphous group of casuals. As noted above, Group 2 extras are people who have industry wide priority numbers issued by the Union on the basis of when they attained RHS or Group 1 status at any signatory employer and therefore became eligible for union membership. Also as noted above, it is a rare exception when anyone chose not to become a union member. There was, however, a small group of individuals who would otherwise have become eligible for union membership but who were refused membership. Insofar as C&S is concerned, individuals who, from time to time, sought and obtained employment based on their Group 2 seniority status were placed ahead of any individuals who sought employment on a more casual basis.

In 1992, Imperial, a predecessor to C&S was engaged in a labor dispute with NMDU and during a work stoppage, it hired a group of employees as replacements. These included Enrique Grados, Richard Atkins, Djevalin Gojani, Willie Miles, Jimmy Clark and Eduardo Valentin. When C&S purchased this company it hired the predecessor's employees including these people.

[16] In 1997 or 1998, C&S closed the Rockland facility acquired through the purchase of Rockland News and transferred those drivers to other facilities, a majority of which were transferred to New Rochelle. Following the transfer to New Rochelle, the company operated with two seniority lists, one for the former New Rochelle employees and the other for the former Rockland News employees. In 1999, C&S and the NMDU agreed to merge the two seniority lists for the employees working out of New Rochelle facility and merge the lists for the employees who were working at two facilities in New Jersey. In merging the New Rochelle lists there was a dispute as to whether the Rockland employees should be dove tailed or end tailed for seniority purposes. When no agreement was reached the matter was arbitrated.

In *NMDU (City and Suburban Delivery System*), 332 NLRB 870 (2000), a case involving charges filed by Miles Clark and Valentin, the Board issued a decision which concluded that the Union violated Section 8(b)(1)(A) and (2) by vetoing, in May 1998, the promotion of these specific individuals to regular situation holder positions at C&S because they had crossed a picket line in 1992. Complying with the Board's Order, Miles, Clark and Valentin were reassigned new made steady dates to May 4, 1998. (Therefore their seniority status on the C&S regular situation holder was made retroactive to May 4, 1998 instead of May 21, 2000 when the employer actually promoted them to the regular situation holder list. The Board's Order did not deal with any other employees who crossed the picket line and the Order did not require the Union to modify the seniority dates of any persons other than the three charging parties in that case.

In May 2000, C&S notified the Union that it was elevating all of the above named individuals to regular situation status effective on May 21, 2000. The company added them to the New Rochelle seniority list with a "steady date" of May 21, 2000. When they, along with other employee also promoted to regular situation status, were invited to the Union hall they were asked if they crossed a picket line and they admitted that they had. As a consequence, the Union while accepting the other employees into membership told these "strike breakers" that they would not be admitted to union membership. Therefore, as a result of the May 2000 promotions *and* the Board's Decision and Order in 332 NLRB 870, Miles, Clark and Valentin were ultimately promoted to regular situation holders at C&S with seniority dates of May 4, 1998 instead of May 21, 2000. But Enrique Grados, Richard Atkins and Djevalin Gojani who were not parties to the Board case, which did not require relief for any persons other than the charging parties, and who were also promoted by the Company to regular situation status in May 2000 were given C&S seniority as of May 21, 2000. At a much later date when their seniority status became important, the Union refused requests to alter their seniority dates.

On September 8, 2008, C&S held meetings with it drivers to announce that the company was going out of business. As noted above, this possibility was well known in the industry and the Union in anticipation of the closing was making efforts to keep open regular situation holder and Group 1 jobs at other employers to which the C&S employees might be hired.

On November 20, 2008, the NMDU and the New York Times entered into a closure agreement to deal with the situation once C&S terminated operations as of January 4, 2009. By the terms of this agreement, the Times consented to hire 65 C&S regular situation holders and place them at the bottom of the Times regular situation holder seniority list. The Times also agreed to pay a buyout worth $100,000 to regular situation holders of C&S who opted to not transfer to the Times and to leave the industry. The agreement provided that these choices applied only to regular situation holders employed by C&S and that they would make their selection in order of seniority. The agreement also provided that any remaining C&S regular situation holders, (and C&S Group 1 employees), who neither got the buyout nor the transfers would receive 8 weeks of severance pay. [17] In a letter attached to the closure agreement from Terry Hayes to Douglas Panattier Jr. it states:

> This confirms our understanding that the term "seniority," when used in this Closing Agreement, refers to industry-wide priority. This definition of "seniority" is

[17] Exhibits A and B to the closing agreement shows that as December 31, 2008, C&S employed 362 regular situation holders plus 64 Group 1 extras. The record does not show how many other casual employees may have been employed by C&S during 2008, but that seems to be irrelevant to the issues in this case.

intended to apply only to the Closing Agreement and is not to have any precedential effect for either party in the future.

As described in this letter, this means that seniority for the purpose of selecting the buyouts and/or the transfers would *not* be based on a regular situation holder's seniority date with C&S but rather would be based on how long that individual had worked for companies having contracts with the union. Thus, under this system of determining seniority, a person with the lowest priority number would be the individual who became a regular situation holder or Group 1 employee with any union signatory employer in the past. Moreover, as that would make the individual eligible for union membership, the industry wide priority number would essentially be equivalent to when that individual joined the Union pursuant to a union security clause. In some cases, an individual's C&S seniority date and his priority date would be the same if the individual first started to work in the industry at C&S and stayed with C&S throughout his employment history. However, in other cases, the industry wide priority date would be lower than the C&S seniority date if an individual became a steady employee at another union signatory employer prior to his employment at C&S. (Or a predecessor company taken over by C&S). [18] In that case, the individual would have obtained a priority number and most likely a union membership number, at a date earlier than the date that he obtained his C&S seniority.

In a form letter dated December 10, 2008, the Times notified the C&S regular situation holders and Group 1 employees of their options. It indicated that C&S would close effective on January 4, 2009 and it gives these employees until January 26, 2009 to make a selection. (The letter provided a form for election). The employees were notified that if someone chose a buyout and got it, he would not be eligible to be hired by the New York Times and vice versa. Also, if an employee accepted the buyout, he would lose all of his industry wide seniority which meant that he no longer could seek jobs at other union signatory employers as a Group 2 extra. (This means that he effectively would be retired from the industry).

During the period from November 2008 through January 2009, the Union prepared and transmitted to the Times several seniority lists for the C&S employees. The first listed the C&S employees by their union card numbers. This, however, was superseded by a second list dated November 19, 2008 that ranked the C&S employees by their industry wide seniority numbers. The lowest being the person with the most seniority. Another revised list was sent on November 18 and this was again revised by the Union on January 8, 2009. A final revision was made on January 29, 2009 after the Times pressed the Union to make certain that it had an accurate list.

On December 29, 2008, a meeting was held where the eligible C&S employees gathered to make their choices. (Employees could also mail in their choices if they chose not to attend this meeting).

Ultimately, the C&S employees made their elections and these were presented to the New York Times. In February 2009, the Times began to distribute $100,000 checks to certain former C&S employees. Also, the Times hired a group of former C&S employees.

[18] General Counsel Exhibit 46 is a list of regular situation holders and Group 1 employees who were employed by C&S as of September 2008. The list has 426 names. In addition, the exhibit shows the locations where the employee worked; their hire date with C&S; their seniority dates with C&S; and the hire date at any predecessor employer which had been purchased by C&S.

There is no question but that the use of industry wide priority numbers to select the buyouts or the transfers gave some C&S employees with less C&S seniority some degree of preference in terms of having their choices selected. In the case of the buyouts, the Times has set aside $600,000 representing payments to six individuals because there is a question as to which six individuals should have had their buyout elections accepted. Although the General Counsel has not identified any specific individuals, other than Grados, Atkins and Gojani who should have had their buy out elections accepted, it seems reasonable to assume that there were at least a total of six who were adversely affected by using industry wide priority numbers instead of using C&S seniority as the basis for the selection process.

Further, even as to those people who elected to transfer to being regular situation holders at the Times, the use of industry wide priority number seniority as opposed to C&S seniority meant that when these 65 people were placed on the Times seniority list, their places on that seniority list were affected either favorably or adversely. And because seniority status among regular situation holders can make a difference in various terms and conditions of employment, the use of seniority based on time worked for all signatory employers gives a distinct advantage versus those whose seniority is measured only by their employment with C&S.

In the cases involving Grados, Atkins and Gojani, it is possible that if the seniority basis for the selection of the buyouts was changed from being based on seniority with union signatory companies to seniority solely within C&S as of the time that they were promoted to regular situation holders, (May 2000), that they would have had sufficient seniority to have had their picks for the $100,000 buyouts accepted.

The General Counsel also posits an alternative theory on behalf of these three employees. As I understand the argument, the General Counsel assert that the Union should have altered their industry wide priority dates and that it breached its duty of fair representation in refusing to do so.

In May 2000, Grados, Atkins and Gojani were elevated to regular situation holder status at C&S's New Rochelle facility along with other employees. When they were invited to the Union hall, they were asked if they had ever crossed a union picket line and when they answered affirmatively, they were told that they could not become union members. As I understand the situation, both their seniority date as a regular situation holder with C&S and their union industry wide priority numbers would be based on this date as this is the date that they were promoted to being regular situation holders.

It is true that there have been instances where employees at C&S have had their seniority dates with C&S corrected and there was an instance in 2001 when, pursuant to a settlement of a grievance, a group of nine drivers had their dates changed from June 2, 1998 to May 4, 1998. This included three drivers Dunn, Naclerio and Antonaccio. But if their C&S seniority dates were changed from June 1998 to May 1998, they still would be ahead of Grados, Atkins and Gojani, whose seniority dates at C&S were in May 2000.

After their picks for the buyouts were rejected, Grados and Gojani complained to the Union and asserted that there were some (unnamed) drivers with less C&S seniority who had lower industry priority numbers and therefore trumped them when they made their buyout bids. At one point Gojani complained that the Union had changed the priority number of Miles and the Union's representative replied that Miles was a charging party in the previous Board case whose priority number had been changed as a result of that decision. Gojani was told that he was not a party to that case and that the Union was therefore not obligated to change his

number. And this is, in my opinion, a correct interpretation of the Union's obligation pursuant to the previous Board decision as it had not been alleged in that case that Gojani, Atkins or Grados had been discriminatorily denied promotions to regular situation holder status at C&S in 1998.

In my opinion, the General Counsel has not shown sufficient evidence that Grados, Atkins or Gojani should have had their priority numbers changed to a number consistent with a date earlier than the date that they actually were promoted to regular situation holder status at C&S. [19] Nor am I satisfied that there has been a dispositive showing in this current proceeding that any C&S drivers, promoted to regular situation holder status *after* Grados, Atkins or Gojani at C&S, received lower (and therefore better), union industry priority numbers. At this stage of the proceeding, I cannot say that these three individuals would have been in a position to beat out any of the other C&S regular situation holders in vying for the buyouts. However, in the event that it is determined that the Union violated the Act by using industry wide priority numbers, instead of C&S seniority as the basis for making the buyout selections, then the General Counsel could show at the compliance stage of the proceeding that Grados Atkins and/or Gojani had better seniority status than other C&S employees who bid for and were selected to receive the buyouts.[20]

**(d) Agency Fee and Beck Issues**

The General Counsel contends that the NMDU violated the Act by requiring certain employees to pay agency fees while denying them union membership and work opportunities. I don't agree.

The collective bargaining agreements between the Union, the Post, C&S and most or all other signatory employees, require employees in Group 3 or Group 4 status to pay agency fees to the Union as a condition of continued employment. General Counsel Exhibit 71 is an agency fee form that states that the fee amount per shift may not exceed 5% of the dues payable monthly by union members. That is, a person who works as a Group 3 or Group 4 extra, is required, (after 30 days of employment), to only pay an amount for each shift that he actually works.

The agency fee form further states:

> I further understand that this fee is for services provided and creates absolutely no rights or privileges of membership in the NMDU, nor any preference for or expectancy of membership.

I note that apart from some trivial expenses used to reimburse union officials who go to members' funerals, there is no evidence that the Union uses union dues or agency fees for any purpose other than collective bargaining or contract administration.

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[19] Maybe I am missing something, but I really don't understand the General Counsel's argument that the seniority status for these three individuals as regular situation holders at C&S should be changed to a date earlier than when they were actually promoted.

[20] This could be demonstrated simply by seeing if any C&S drivers who had their buyout bids accepted, were made regular situation holders after the dates that Grados, Atkins and Gojani were promoted to be regular situation holders. If that were the case, then the three alleged discriminates would each be entitled to the $500,000 buyouts. Complications could however, arise if only one or two other C&S drivers with less C&S seniority had their buyout bids accepted.

In support of this contention, the General Counsel cites *Bricklayers Local 1 (Denton's Tuckpointing*), 308 NLRB 350, 352-53. That case involved a situation where the Union charged a work permit fee to nonmembers while at the same time refusing to refer them from its hiring hall. Not surprisingly, the Board concluded that a union which charges non-member a fee for referrals but refuses to carry out its implied promise to refer them to jobs from its hiring hall, has violated the Act. As the Judge noted;

> The fee is not a service or referral fee since nonmembers are not referred. The fee, on this record, serves no purpose except to enrich the Union, to restrain nonmembers and to keep track of employers employing nonmembers. Indeed, the requirement of nonmembers obtaining union clearance, in the form of a work permit, as a condition of gaining or retaining employment, is merely part of closed-shop mechanics and violated Section 8(b)(1)(A) and (2) of the Act."

The cited case is not really pertinent to the case at hand. The NMDU charges an agency fee which is based only on the days that an individual actually works. This is not a case where a fee is charged for an illusory promise of work. On the contrary, the fee is only charged when an individual non-member actually works and gets paid. And in the case of the Post at least, the evidence was that individuals on the Group 3 list tended to work five days a week on a regular basis. Further, while not being allowed to become members, it cannot be said that people who obtain employment by virtue of their Group 3 or Group 4 status are not beneficiaries of the Union's role in collective bargaining. Notwithstanding their non-membership, these non-members receive the same wage rates and the same contractual benefits as any other driver in the bargaining unit. [21]

The General Counsel also alleges that the Union violated the Act by failing to provide Beck notices to the employees of the New York Post.

Under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that employees who choose to be non-members can only be required to pay an agency fee in circumstances where a collective bargaining agreement requires the payment of union dues. Moreover, the Court held that the amount required can only be equal to that portion of normal union dues that are used for collective bargaining activities.

Thereafter, in *California Saw & Knife Works*, 320 NLRB 224 (1995), the Board concluded that a union must notify all unit employees of their right to refrain from union membership before requiring non-member employees to pay agency fees under a union security contract. The Board required, inter alia, that unit employees be given sufficient information to enable an employee to decide whether to object to becoming a union member and to be apprised of any internal procedures for filing an objection.

In *Paperworkers Local 1033 (Weyerhaeuser Paper*), 320 NLRB 349 (1995), the Board required that all employees, (members and non-members alike), covered by union security clauses must be given affirmative notice of their rights to object to union membership and their right to pay an agency fee. In this regard the Board stated:

[21] There is no contention by the General Counsel that the agency fees are excessive or greater on a pro-rated basis than union membership dues.

> This notice requirement is satisfied by giving the unit employee notice once and is not a
> continuing requirement. Thus, newly hired nonmembers must be given *Beck* and *General Motors* notice once—at the time the union first seeks to obligate them to pay dues. The same notice to members is likewise required to be given once, if they have not previously received it. The form of such notice is not prescribed by the Board, moreover, and ''the union meets [its] obligation as long as it has taken reasonable steps'' to notify employees of their *Beck* rights before they become subject to obligations under the union-security clause. *California Saw & Knife*, supra, slip op. at 10. The same holds true of their *General Motors* rights.

In the present case, the only evidence that the Union gave any notice to any members or unit employees was a one-time notice in the Union's in house bulletin that was published in 2003. Notwithstanding a subpoena issued by the General Counsel, the Union did not produce, other than the 2003 bulletin any documents that would show that any other notices were ever issued to employees covered by the union security clause. Nor was there any testimonial evidence to show that as a matter of course or standard operating procedure, employees at the Post were told of their Beck/General Motors rights before they become subject to the obligations of the contractual union security provisions.

Having established that the only notice given to employees was the one issued in a union publication in 2003, it is my opinion that this simply is not enough. Therefore I shall conclude that in this respect the Union violated Section 8(b)(1)(A) of the Act.

**(e) Daniel Altieri**

The record shows that Daniel Altieri, in January 20009, quit his job at C&S to went to work at El Diario. As of July, 2010, he was $1,445 in arrears on his union dues. In a letter dated August 10, 2010, the Union wrote to him as follows:

> In accordance with Article XIV, Section 5, you are expelled from the [NMDU] because you are 6 months or more in arrears in union dues. As a result of being an expelled member, you can lose all claims to employment at your employer or at any employer that is governed by a collective bargaining agreement between the NMDU and those employers.

Clearly the Union could expel Altieri for his failure to pay union dues. That, however, is not the issue here.

While at C&S, Altieri chose to be a member of the Union and pursuant to the contract's union security clause, he was required to pay the periodic dues that are ordinarily required of membership. And if he remained employed at C&S or its successor, the New York Times, he could have been terminated from employment if he continued to not pay union dues after being properly notified of that obligation.

But Altieri at the time he received this notice, was not an employee of C&S/New York Times and was employed at El Diaro. Therefore, the fact that he was in arrears at his former employer cannot, under Board law, be used to preclude his employment at another employer covered by a contract in a separate bargaining unit. *Iron Workers Local 118 (Pittsburg Des Moines Steel Co.*), 257 NLRB 564. 566 (1981), enfd. 720 F.2d 1031(9th Cir. 1983). In that case the Board stated:

Thus, it is well settled that a union lawfully may seek the discharge of an employee whose dues are in arrears if it has a valid union-security clause in its collective-bargaining agreement with the employer. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL. (Bull Steamship Co.) v. N.L.R.B.,* 347 U.S. 17, 40-41 (1954). Furthermore, a valid union-security clause can be enforced at the hiring hall level by a refusal to refer an employee whose dues are in arrears, so long as the employee has already worked for the statutory grace period in the bargaining unit to which the collective-bargaining agreement containing the union-security clause applies. *Mayfair Coat & Suit Co.,* 140 NLRB 1333 (1963). However, the Board has held that a member who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering a separate bargaining unit without affording him the statutory grace period in which to become current in his or her dues.

Therefore, it is my opinion that the August 2010 notice issued to Altieri was too broad and exceeded, (probably inadvertently), what was permitted under the statute. I therefore shall conclude that in this respect, the Union violated Section 8(b)(1)(A) of the Act.

**(f) Analysis**

I can recall a time in the 1950s when my father brought home three newspapers every day; The New York Post, the World Telegram and Sun and the Herald Tribune. Of these, only the Post continues to exist and its existence, for a time, hung by a thread. I will take notice that the newspaper industry in New York has been in a continual decline with fewer and fewer papers being published and delivered. This trend, no doubt has been accelerated with the advent of the Internet.

All of the significant allegations in these cases arise from the fact that in late 2009, a big employer of NMDU represented drivers was about to go out of business and the Union found itself in the unfortunate position of trying to either **(a)** obtain substantial severance packages for at least some of these employees or **(b)** jobs elsewhere for those individuals who wanted to continue being employed. This was, no doubt, a difficult circumstance for the employees, the employers and the Union. And in my opinion, the Union was trying to do its best in a bad situation to mitigate the damage that C&S's closing would cause to a great many employees.

The question here is not whether the Union acted with good or malicious intent; but rather in dealing with this difficult circumstance, whether it acted and made agreements with the respective employers within the limits allowed by the National Labor Relations Act.

In setting up a preference system to deal with the C&S closing, the Union decided to use seniority as the basis upon which employees would be able to make choices. The Union contends that the seniority system it chose to utilize was not in any way based on union membership, but rather based on the amount of time that an employee spent working in the industry. This would be represented, according to the Union, by an industry wide priority number where the lower the number, the better one's seniority preference. The problem is that the definition that the Union has used is one based on when an individual started working as a regular situation holder or Group 1 extra at any employer, within the New York Metropolitan area, *having a contractual agreement with the NMDU*. That is, the seniority system that the Union chose and that was acceded to by the Post and the Times, was one based on the amount of time that an employee worked for union signatory shops and not one that measured seniority by the amount of time that the employee worked with either C&S or the New York Post.

Moreover, while the Post at one time may have been a member of the Publisher's Association and the companies acquired by C&S may have been members of the Suburban Wholesaler's Association, there never was any multi-employer bargaining unit that covered all NMDU represented drivers throughout the greater New York metropolitan area. And at the time that the most recent collective bargaining agreements were made and when the seniority preferences were implemented in 2009 and 2010, neither C&S, the New York Times, nor the Post were part of any multi-employer bargaining unit.

Section 8(b)(1)(A) and 8(b)(2) states:

> It shall be an unfair labor practice for a labor organization or its agents--
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7, Provided; That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8 (a) (3)] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 7 of the Act gives employees the rights to join, assist or support labor organizations or to engage in concerted activity for their mutual aid or protection. This provision also gives employees the right to refrain from such activities or from being union members.

Section 8(a)(3) makes it unlawful for an employer, except to the extent that there exists a lawful union security clause requiring membership after 30 days of employment, to discriminate, in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization. [22]

Thus, although loyalty is a trait much admired, this is trumped where the provisions of the National Labor Relations Act, impose constraints against favoring union members over non-members.

*Whiting Milk Corporation*, 145 NLRB 1035 (1964), represents an early Board case involving a situation somewhat analogous to the present cases. And the basic rule of law as espoused by the Board's in these types of cases has continued to the present, even though the Board's decision was not enforced by the First Circuit Court of Appeals. *NLRB v. Whiting Milk Corp*., 342 F.2d 8 (1st Cir. 1965).

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[22] In *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963), the Supreme Court held that notwithstanding the existence of a valid union security clause, an employee could not be required to become an actual member of a labor organization, albeit he or she could be required to pay reasonable fees. The Court held that it was sufficient for employees to become "financial core" members without requiring them to become actual union members. In so holding, the Court did not require contracts containing union security clauses written in accordance with the statutory language of 8(a)(3) to be rewritten. It was only later that the Board required unions to notify employees of their right to refrain from becoming union members. *California Saw & Knife Works supra.*

In *Whiting*, an employer and a union had a collective bargaining agreement through a multi-employer bargaining association that contained a clause that provided that if any employer acquired or merged with "another Union Company," the preexisting seniority of the employees of the acquired company shall be preserved and integrated with the seniority of the employees of the acquiring company. In that case, Whiting acquired another company called White Milk Company that had five facilities. At four, the employees had been represented by the Union and at the fifth, the employees were unrepresented. In conformity with the contractual provision, the former employees at the four represented plants were accorded preferred seniority status over those at the unrepresented plant. The employees in the first group were treated as carrying their seniority over to Whiting. The other employees were treated for seniority purposes as if they were newly hired employees. For some time after the merger, the seniority situation did not affect the charging parties who had been employed at the unrepresented facility and who had been placed at the bottom of the seniority list. Nevertheless when a layoff came about, the charging parties were laid off and their selection for layoff was governed by the contractual provision that had been previously been implement and that had caused them to be at bottom end of seniority. In finding a violation, the Board stated:

> But for clause 81, which requiring Whiting to place their names at the bottom of the companywide seniority list and thereafter to maintain their inferior status on that list, they would not have been laid off at all. That their selection for layoff was substantially related to their earlier lack of membership in the Union was reaffirmed by Whiting at the time of such action. As found by the Trial Examiner, the Hyannis plant manager, when laying off Walsh and O'Neil made statements to the effect that their replacements had been in the Union longer than they had and that if Walsh and O'Neil had joined the union while working for White, they could not have been selected for layoff.

Also relevant to the present case, I note that the Board in *Whiting* rejected a claim that the statute of limitations in Section 10(b) of the Act should run from the date that the seniority status was first established (pursuant to clause 81) and not from the date that the two employees were laid off. In this regard, the Board stated:

> Respondents contend that Section 10(b) operates as a bar to any violation finding as to these layoffs because Walsh and O'Neil were first subjected to the terms of the discriminatory seniority provision though not to the actual operation thereof which effectively disrupted their employment tenure--when they were first placed on this discriminatory seniority roster more than 6 months prior to the filing of charges giving rise to this proceeding. We reject that contention. The seniority roster on which Walsh and O'Neil were placed prior to the 10 (b) period was dependent upon, and had no durability or binding force of its own apart from the contractual provision which required it . The Charging Parties' continued discriminatory retention on the seniority roster, which otherwise might have been corrected, was *compelled by* the uninterrupted maintenance of the illegal contract term within the 10(b) period. The selection for layoff of Walsh and O'Neil also within the 10(b) period thus resulted from the enforcement of the unlawfully maintained seniority provision.
>
> Our finding of a violation need not, and does not, depend on a subsidiary finding that Respondents engaged in a time-barred unfair labor practice. Wholly apart from any such earlier unfair labor practice, it is sufficient to spell out a violation here that the layoffs of Walsh and O'Neil were directly attributable to the

> application within the 10(b) period of an unlawfully maintained discriminatory contract provision. Here, as in the closely parallel *Potlatch Forest* case, which was cited with apparent approval by the Supreme Court in the *Bryan Manufacturing* case and which we regard as square authority for the holding we make, Respondents' conduct during the barred period has been considered merely for the purpose of bringing into clearer focus the current conduct which, even without reliance on any earlier unfair labor practice, supports a finding of statutory violation in the layoffs. (citations omitted). [23]

Not only is preference based on union membership vs. non-membership unlawful, but preferences granted on the basis of any membership considerations would violate the Act. For example, in *Reading Anthracite Company (United Mineworkers of America, Local 807),* 326 NLRB 1370 (1998), a Local 7226 was merged into a Local 807 for a single unit and the surviving union, (Local 807), caused the employer to assign all the former Local 7226 members seniority dates that reflected the day they joined Local 807 and not the dates that they began work at the mine. The Board stated:

> Local 807 and District 2 violated the Act….It is unlawful to use "membership" considerations, e.g., date of local membership, to determine conditions of employment. Such conduct violates Section 8(b)(2) by discriminatorily encouraging membership in that local.

In *IATSE, Local 659*, 197 NLRB 1187 (1972), the Board dealt with a contractual hiring system whereby certain employees who were placed on a roster received hiring preference by virtue of the amount of time that they had worked at union signatory employers. In determining whether an employee was eligible to be placed on the roster, his work experience with employers other than those who signed one of the aforementioned collective bargaining agreements was not considered. Therefore, under this arrangement, qualifying experience was generally limited to experience with employers having a collective-bargaining agreement with the Respondent and/or IATSE. The Board stated:

> There can be no doubt that the actions of Respondent in applying the roster restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act. In part, Section 7 gives employees the right to bargain collectively through representatives of their own choosing, or to refrain therefrom, subject of course to majority rule. Respondent's actions penalize employees for having exercised their statutory right to refrain from bargaining collectively through Respondent in the past, while rewarding those employees who have chosen to work in units represented by Respondent.
>
> Respondent contends that the roster provisions, as interpreted and applied, are lawful because the employers, both the Independents and members of the Association, in effect, formed a multiemployer bargaining unit for seniority purposes.
>
> Respondent further contends, however, that even if a multiemployer bargaining unit does not exist, there is still no violation of the Act since the

[23] In *Teamsters Local Union 896 (Anheuser-Busch),* 296 NLRB 1025 (1989) the Board rejected a similar argument based on Section 10(b). See also *District 17, United Mine Workers of America*, 315 NLRB 1052, (1994).

seniority provisions are unrelated to union considerations and merely protect the so-called "integrity of the bargaining unit." We find this contention to be without merit.

It is well settled that a bargaining representative for the employees of a particular unit has the right to make seniority depend on the date of hire in the unit and thus to give an inferior seniority ranking to employees transferred from another unit. *General Drivers and Helpers Local Union 229, Teamsters (Associated, Transport, Inc.),* 185 NLRB No. 84. We have heretofore concluded that each Independent employer comprised a separate bargaining unit. We are not faced here with a situation where new employees are being placed at the bottom of a unit seniority list. On the contrary, this case presents a situation wherein Respondent prevents an applicant from obtaining initial employment unless he has had prior employment at which he was represented by the Union. The question here is not what seniority rights an employee acquires after working in a unit represented by Respondent, but what rights the applicant has to start with when he seeks employment with an employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Respondent admits that if an employee had acquired seniority rights under a collective-bargaining contract to which Respondent and/or IATSE is a party, those rights will be honored where the employee seeks employment in an entirely separate unit which is also represented by Respondent. On the other hand, an employee cannot commence work in a unit represented by Respondent unless he has previously worked in a unit covered by a collective-bargaining contract to which Respondent and/or IATSE is a party. Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent.

The above illustrates that initial employment in a unit represented by Respondent is based strictly on union considerations. No matter what qualifications an employee brings with him, if he has not in the past been represented by Respondent, he cannot gain employment with any employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Accordingly, we conclude that Respondent, by applying the seniority provisions against any Association or Independent employer as if all such employers comprise a single bargaining unit, and in particular by the manner in which Respondent has applied the roster provisions with respect to Colman and Lapenieks, has unlawfully restrained and coerced employees in the exercise of their statutory rights and thereby violated Section 8(b)(1)(A) of the Act. [24]

[24] See also *Directors Guild of America Inc*., 198 NLRB 707 (1972) and *Painters Union, Local 77 (Colorite Inc.),* 222 NLRB 607 (1976). The latter case deals with the unlawful granting of preferences in hiring hall referrals to employees who have worked for union signatory employers as opposed to employees who did not. The Board stated: 'Thus it is clear that the preference in employment is not based on length of service with a particular employer or within a multiemployer bargaining unit, but rather on considerations of prior union representation. Such a preference is violative of Section 8(b)(1)(A) and (2) of the Act."

In *Seafarers International Union*, 244 NLRB 641, the Union operated a hiring hall pursuant to a contract with various signatory employers pursuant to which job applicants were sorted into groups A, B and C and where priority was based on work experience for signatory employers for a minimum of 90 days for 2 consecutive years. In finding a violation, the Board stated:

> Contrary to the Administrative Law Judge, we find that the General Counsel has established a *prima facie* case that Respondent's implementation of its hiring hall referral system, in strict adherence to the seniority preferences and in tandem with the union security requirements upon signatory employers, unlawfully favors jobseekers who are union members over nonmembers and also requires signatory employers to discriminate with respect to hiring. The General Counsel's case is strongly supported by the testimony of Worley, Respondent's own witness with respect to the referral practices of the parties which shows that membership is not only encouraged but actively suggested, if not required, in the form of the request of individuals seeking to upgrade seniority ratings to make application for membership at that time.
>
> We do not agree with the Administrative Law Judge that specific examples of discrimination are required for the finding of a violation herein. Nor do we fault the General Counsel for failing to foreclose the theoretical possibility that nonmembers could obtain sufficient work experience with signatory employers to qualify, for example, for B seniority ratings without having to join the Union under the applicable union-security provisions. For the burden of negating the General Counsel's *prima facie* case of discrimination in hiring referrals falls on Respondent as the sole custodian of the hiring hall records. Its failure to do so creates an adverse inference that such evidence in its possession is not favorable to Respondent's case.
>
> Finally, we disagree with the Administrative Law Judge's blanket acceptance of Respondent's business justification defense and his conclusion that such valid business criteria render the referral procedures lawful. Assuming, *arguendo,* that the evidence proves a genuine necessity for requiring experienced workers relating to reasons of safety, Respondent has failed to adduce any evidence to distinguish between the work experience acquired with signatory employers in contrast to other employers, or to show how experience with the former meets the legitimate requirements while the latter does not, or even whether the factor of work experience has any valid bearing upon referral seniority.

There are exceptions of course. If a Respondent can show that the contractually based seniority system is ambiguous and therefore not facially invalid and/or if there are legitimate reasons for establishing a preference based at least in part, on employment with other union signatory employers, then the Board may conclude that there is no violation. For example in *Teamsters Local Union 896 (Anheuser-Busch),* 296 NLRB 1025 (1989), the issue was whether the Teamsters violated Section 8(b)(1)(A) and (2) by invoking a provision of its contract with Anheuser-Busch giving permanent employees laid off by other employers who have contracts with the Respondent, a preferential seniority right to work for Anheuser-Busch instead of temporary employees whose job seniority with that Employer would otherwise have entitled them to work. The Board stated:

For the reasons set forth below, we find that the stipulated record does not establish that the contractual seniority bumping preference, on its face or as applied, violates Section 8(b)(1)(A) and (2) of the Act. First, there is no evidence that the continuation of the preference in the more than 15 years since Anheuser-Busch withdrew from the multiemployer bargaining unit has actually resulted in any discrimination against any employee or hiring hall applicant on the basis of nonunion or non-unit status. In the absence of such evidence, it cannot be presumed from the contractual language itself, which is amenable to a lawful interpretation that the Respondent would act unlawfully by refusing to dispatch as a permanent employee "bumping" an individual claiming credit for employment with a California brewer, such as Anchor Steam, whose employees are not represented by the Union. Second, the circumstances and the background of this case present an unusual justification for the bumping practice in that the preference is but one of three seniority-based contractual vestiges of the multiemployer relationship voluntarily continued by Anheuser-Busch and other surviving employer-members after their withdrawal from the formal multiemployer unit. The contractual bumping preference clearly does not discriminate on the basis of union membership. It does entail a credit for work experience with employers having a contract with the Respondent, but the preference challenged here differs significantly to signatory employment found unlawful by the Board in cases cited by the General Counsel and the Charging Party. These critical differences relate specifically to the statutory issues of whether there is discrimination in the preference that expressly relates to union considerations and if so whether and to what extent it is discrimination that encourages union representation.

Here, in contrast to the cited cases, the permanent employee bumping right does not prevent a job applicant "from obtaining initial employment unless he has had prior employment at which he was represented by the Union," does not create a general referral class preference based exclusively on work experience under union signatory and union security conditions, does not preclude anyone from achieving permanent employee status, and does not permit one permanent employee to bump another permanent employee on the basis of prior non-unit experience. Thus, the contract provision at issue is arguably skill based. Furthermore, the bumping right cannot be secured or avoided merely by joining the Union or by working for employers who have contracts with the Union. Rather, individuals claiming the right must also have worked a specific length of time to attain permanent employee status *and* thereafter have been laid off by a signatory employer. Finally, the language of section 4(a)(1) of the contract ambiguously defines a permanent employee as one who has worked 45 weeks "under this Agreement in one classification in one calendar year *as an employee of the brewing industry in this State."* The italicized phrase is capable of an interpretation, in the absence of actual practice to the contrary and in light of the nondiscrimination clause in the contract that the parties may give credit towards permanent employee status to work performed for non-signatory California brewers."

Admittedly, the provision's limiting of the bumping right to permanent employees who have been laid off by signatory employers appears to discriminate on its face against brewery workers whose last employer did not have a contract with the Union, but it also discriminates against permanent employees who left their prior employment with a signatory employer for reasons other than layoff. To the

> extent that the union signatory layoff requirement discriminates on the basis of union considerations, it is highly speculative to suggest that such discrimination would encourage brewery workers to restrict their work experience to union signatories. In any event, as further discussed below, multiemployer considerations carrying over from the defunct multiemployer unit fully justify this incidental, potentially discriminatory feature. Thus, the challenged seniority preference is capable of an interpretation that it is a lawful seniority-based contractual right. (Footnotes omitted).

In my opinion the facts in the Anheuser-Busch case and the Board's rationale is distinguishable from the present cases. First, there is no ambiguity that the seniority system utilized in the various circumstances herein was based on an individual's length of employment for another employer having a collective bargaining agreement with the NMDU. There is no ambiguity here. The intent clearly was *not* to give seniority credit to employees who were employed as drivers for companies that were not signatories to a contract with the NMDU; either inside or outside of the newspaper industry. Second, there is no evidence to suggest that the preferences granted in the present case were in any way skill based or required by virtue of safety reasons. Thirdly, as neither C&S, the New York Times, nor the New York Post were every members of any overall single multi-employer bargaining unit, (and have not been part of any multi-bargaining units for many years), there is, in my opinion, no basis for any claim that a seniority system based on employment at other NMDU signatory employers was a justifiable "vestige" from a previous multi-employer contract. And finally, there is no doubt, (as there was in Anheuser Busch), that a number of employees in the present cases suffered actual as opposed to theoretical discrimination. In the present cases, the use of seniority based on employment at other employers having NMDU contracts has tangibly and adversely affected identifiable groups of employees at the New York Post and employees at C&S/New York Times.

The Respondent places a good deal of emphasis on a case involving the New York Typographical Union, a case where the Board found that the Union violated the Act, but the Second Circuit Court of Appeals did not.

In *New York Typographical Union No. 6*, 242 NLRB 378 (1979), the Union had collective bargaining agreement with a large number of companies, many of which were through a contract with a multi-employer association. It also had contracts with other shops which, although not members of the association, had agreed to bound to the terms of the association-wide contract. The charging parties were job applicants to a company that was not a member of the association and they contended that the hiring hall provisions of the collective bargaining agreement gave priority in hiring to any employees who were either employed by or laid off by union signatory employers. The Board concluded that the independent employers were not part of a multi-employer bargaining agreement and that the contractual provisions as applied to independent employers violated Section 8(b)(1)(A) & (2). The Board stated:

> Inasmuch as League members and Independent employers are not part of a single multiemployer unit, the preference in question is not based upon the seniority or work experience acquired by an employee in a single bargaining unit. Rather, it is based upon an employee's employment in a shop under contract with the Union. Therefore, it directly related to membership in the Union. Such a provision discriminates in favor of union members over nonmembers and, consequently, restrains and coerces employees in the exercise of their Section 7 rights.

In *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171 (2nd Cir. 1980), the Court started out by disagreeing with the Board's finding that the employers involved were not part of a single multi-employer bargaining unit. Nevertheless, the Court stated that its reason for reversing the Board was not limited to that finding. Notwithstanding the ALJ's conclusion that the contract provision establishing a Class A group that favored only union members over nonmembers, the Court noted that at least one person, (out of 3700), in the "favored" category was not a union member and that the criteria for placement in this category allowed at least some nonunion employees to be treated equally with employees in union shops. Since the persons in the favored category were almost all union members and were given preference over job applicants who were not members, I must say that I am somewhat confused by the Court's analysis.

I do note, however, that the Court may have concluded that irrespective of the contract's granting of preference to employees who worked in union signatory shops, there nevertheless, were other legitimate and compelling reasons to allow this type of discrimination. The Court noted that the Union had been confronted with problems resulting from mechanization in the printing industry and the decrease in the number of skilled jobs. The Court noting the history of the industry and the declining role of skilled typographical work stated:

> The principal thrust of the agreement was to open the doors of book and job shops to automation through use of "any and all computers," to provide for the training of employees in the skills needed to operate such equipment, and to require the payment of guaranteed income to certain unemployed or underemployed employees from a fund established by the employers. In light of the income guarantees, exclusive hiring hall procedures were instituted and supervised by the fund's trustees to give highest priority in job referrals to employees who were eligible for guaranteed income payments.

Thus, as a preference may be permissible because of safety or skill considerations, the Court in the cited case seems to have been reasonably concerned with the continuing financial viability of the fund established to ease the path for employees to exit the industry because of the automation that was making many of their jobs obsolete.

I also note that because the NLRB is required to interpret a federal law consistently throughout the United States in the geographic areas covered by all the Circuit Courts, I am bound by the decisions of the Board and not by a single reviewing Court of Appeals.

The Respondent also cites *Interstate Bakeries Corporation*, 357 NLRB No. 4, (2011). In that case, the Union represented sales representatives in two separate units having separate contracts. In 2005, the Employer decided to consolidate the routes and an agreement was made with the Union to have the units merged. They also agreed that the employees who worked at Dolly Madison (where the charging party was employed) would be dovetailed according to unit seniority with the employees working at Wonder Bread. When it was discovered that the Charging Party had never been in either unit, the company and the Union agreed that he should be included in the merged unit and although he had the most company seniority, he was placed at the bottom of the newly created seniority list covering employees in the merged unit. Thereafter, he was told that when a route was going to be eliminated, the company and union were going to use "union seniority" to bump him out of his own route. Ultimately this caused the charging party to lose his position at the plant where he worked and required him to commute to another plant 70 miles away. Disagreeing with the ALJ's decision to dismiss the Complaint, the Board concluded that "in the context of a unit merger, a union and an employer are not lawfully permitted to discriminate against all or, as in this case, some of the

merged employees on the basis of their previously unrepresented status." The Board, reiterating much of what has already been described as the law, stated:

> The Board has drawn a clear distinction between discrimination based on *unit* seniority and that based on *union* seniority. A union and an employer do not discriminate in a manner prohibited by the Act by contracting to vest certain employment rights based on seniority in a represented unit. Nor do the parties to a collective bargaining agreement engage in unlawful discrimination by placing a single employee or a group of employees hired or merged into the unit at the end of the seniority list on the grounds that they lacked seniority in the unit. "It is settled," the Board has held, "that a bargaining representative for the employees of a particular unit has the right to give an inferior seniority ranking to employees transferred from another unit." *General Drivers and Helpers Local 229 (Associated Transport, Inc.)*, 185 NLRB 631, 631 (1970). In short, "a union may lawfully insist on the endtailing of new bargaining unit employees' seniority when it is based on unit rather than union considerations." *Riser Foods,* supra, 309 NLRB at 636.
>
> What is unlawful under the Act is for such parties to place employees at the end of the seniority list because they were unrepresented by a particular union or any union in their prior employment. That is the form of discrimination which was at issue in *Whiting Milk*. In that case, the contract provided for the dovetailing of seniority in the event of merger with "another Union Company." Id., 145 NLRB at 1036. The Board found that "[t]he term 'Union Company' is construed by the parties as meaning an employer whose employees have been represented by the Respondent Union." Id. Thus, the Board found that the selection of employees for layoff based on endtailed seniority "was substantially related to their earlier lack of membership in the Union." Id. at 1037. The same is true in other cases in which the Board found endtailing unlawful. See *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 50 (1966) ("This sentence [of the contract], on its face, affords preferential treatment to employees of new branches or plants who are Local 869 members and discriminates against those who are not."); *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617, 617 fn. 3 (1995) ("the unions advocated granting less seniority to one of the employee groups on the impermissible basis that the employees in that group had not been represented by a union as long as the employees in the other group."); *Teamsters Local 480 (Hilton D. Wall)*, 167 NLRB 920, 920 fn. 1 (1967) (agreement provided that Wall would be placed on the bottom of the seniority list "because employees of Cookeville Motor Lines had not been represented by a labor organization").

Frankly, I do not see how the Board's decision in *Interstate Bakery* affords much comfort to the Respondent's position in the present case. If anything it seems to affirm the legal propositions of the General Counsel.

It is my conclusion that the agreements made between the NMDU, the Post, C&S and the New York Times, to the extent that they have been implemented, (and continue to be implemented), within the Section 10(b) statute of limitations period, have afforded preferences to individuals based on union seniority instead of unit seniority and have caused actual discrimination against employees at these employers who, although covered by the collective bargaining agreements, were not permitted to become members of the NMDU.

**Conclusions of Law**

1. The collective bargaining units involving employees represented by the NMDU at the New York Post, City and Suburban and the New York Times have at all times material herein been separate collective bargaining units.

2. In my opinion, the hiring provisions of the collective bargaining agreement between the NMDU and the New York Post, which gives a preference to Group 2 people is illegal as it confers a preference based on an individual's length of employment with companies having agreements with the Union other than the Post. As the Post is not and has not been for many years, a member of any multi-employer bargaining unit, the Group 2 preference, is based on union and not unit seniority. Accordingly, it discriminates against employees who are not members of the NMDU and is therefore violative of Section 8(b)(1)(A) and (2) of the Act.

3. On July 9, 2008, the New York Post wrote to the Union and requested that the Post's Group 1 list be opened up so that vacancies could be filled. On July 10, 2008, the Union refused to open up the Post's Group 1 list thereby denying promotions to some of the New York Post's Group 3 non-union employees. In my opinion, the Union's reason for refusing to open the Group 1 list was to require the Post, pursuant to its contract with the Post, to give preference in hiring and seniority when hired, to employees from the soon to be closed C&S, almost all of whom were union members. In this regard, I conclude that the Union thereby violated Section 8(b)(1)(A) & (2) by causing the Post to refuse to promote certain of its own employees because of their non-membership in the Union.

4. In January 2009, the New York Post and the Union agreed that the Post would employ about 50 employees who were being laid off as a result of the closing of C&S, an employer having a contract with the NMDU. That agreement and its implementation provided that the Post would hire these former C&S employees and place them on the Post's Group 1 seniority list with their position on the list based on the length of their employment at union signatory employers other than the New York Post. As a result, these individuals were, by agreement between the Post and the NMDU, granted greater seniority at the Post than other employees of the Post who had more unit seniority at the Post. This agreement therefore discriminated in favor of individuals who were, in almost all cases, union members and discriminated against employees of the Post who were on the Post's Group 3 list and who were not members of the NMDU. I therefore conclude that in this respect, the Union violated Section 8(b)(1)(A) & (2) of the Act.

5. The NMDU and the New York Times entered into an agreement whereby (a) the Times agreed to make payments of $100,000 to 140 employees of C&S who agreed to retire from the industry and (b) the Times agreed to hire 65 C&S employees and place them on its own payroll. (As noted above, the New York Post agreed to hire about 50 C&S employees and I believe that other union signatory companies also chipped in). In devising a procedure whereby the C&S employees could make a choice as to whether to take the buyout or take a new job, the NMDU utilized a system of seniority that was based on the total length of time that a C&S employee worked for union signatory companies instead of how long they had worked at C&S or a company that had been directly acquired by C&S. This system was acceded to by the New York Times and the result was that employees of C&S who had more seniority based on their length of employment at union signatory employers other than C&S, obtained a preference in the bidding process over employees who had greater seniority at C&S. As C&S, itself, has never been part of any multi-employer bargaining group, the seniority system chosen by the NMDU for the bidding was not based on unit seniority but rather based on seniority with union signatory companies outside of the C&S bargaining unit. As a result, the evidence shows that at least 6 individuals who were employed by C&S may have had their buyout bids denied

despite having greater unit seniority than other C&S employees whose buyout bids were accepted. The individuals that were discriminated against may have included Grados, Atkins and Gojani. However, this is not certain at this stage of the proceeding and only a revision of the bid seniority list based solely on C&S seniority will reveal the names of these people whose bids for buyouts were rejected but should have been selected for the buyouts but for the improper use of union signatory seniority rather than C&S seniority. This can be determined, if necessary in any compliance proceeding. In any event, I conclude that in this respect, the Union violated Section 8(b)(1)(A) and (2) of the Act.

6. The evidence shows that pursuant to agreement between the New York Times and the NMDU, the Times agreed to hire a group of former C&S employees, whose bids for job transfers were accepted in accordance with the foregoing bid process. These employees were endtailed at the Times and given seniority status as of their date of hire by the Times. However, within the group of new hires, seniority between them was made on the basis of the amount of time they worked in NMDU signatory shops and not on the basis of their C&S seniority. In my opinion, this arrangement and its implementation is a violation of Section 8(b)(1)(A) and (2) of the Act.

7. The General Counsel contends that the Union violated the Act by requiring employees to pay an agency fee while at the same time denying them union membership and work opportunities. As previously described, it is my conclusion that this allegation is without merit and should be dismissed.

8. The evidence establishes that the only notice that the Union ever gave to employees of the New York Post of their rights to refrain from becoming union members, (despite the existence of a union security provision, requiring membership), was contained in a union bulletin in 2003. As I have concluded that this did not meet the notice requirements set forth in *Paperworkers Local 1033 (Weyerhaeuser Paper)*, 320 NLRB 349 (1995), I find that that in this respect, the Union has violated Section 8(b)(1)(A) of the Act

9. In my opinion, the Union by its August 10, 2010 letter to Daniel Altieri was violative of Section 8(b)(1)(A). This is because the threat to bar him from employment at employers other than his last employer where he was in dues arrears went beyond what was permissible under the Act.

10. The unfair labor practices found to have been committed in these cases affect commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I note here that these cases deal with the enforcement of agreements made between the Union and employers who are not parties to these cases. Therefore, any remedy has to take into account the fact that no order can be issued against the employers.

It is recommended that the Respondent be ordered to cease and desist from giving effect to or enforcing *any* collective bargaining agreements or *any* other agreements that it has or had with City and Suburban, the New York Post or the New York Times which in any way gives preferences to one group of employees over another group of employees based either on

their length of time as union members or on the amount of time that they have been employed by companies having contracts with the NMDU other than the companies by whom they are employed. Among other things, this means that the Union should be ordered to refrain from enforcing or implementing the Group 2 preference in its collective bargaining agreement with the New York Post. [25]

It is recommended that with respect to the New York Post's Regular Situation Holder and Group 1 lists, that the Union request from the employer that the Adjustment Board approve a revision of those lists so that former employees of City and Suburban who were hired by the Post be given seniority standing only from the time that they began their employment at the Post and further revise the lists so that other New York Post employees who have worked longer at the Post be given higher seniority status either as Regular Situation Holders or as Group 1 extras.

To the extent that any New York Post employees have suffered any loss of earnings because of the fact that they were disadvantaged by a granting of greater seniority status to former C&S employees, make them whole, with interest, for any loss of earnings or benefits.

It is recommended that when any employees at the New York Post or the New York Times becomes eligible for union membership by virtue of being placed on a Group 1 list or becoming a regular situation holder, that the employee be notified, in writing, that he or she is entitled to refrain from becoming a union member.

With respect to the $100,000 buyouts, it is recommended that the Union revise the list drawn up pursuant to which employees of City and Suburban made their bids so that it is ordered by the length of time that employees have worked for City and Suburban or an immediate predecessor and not by the length of time that employees have worked for other companies having collective bargaining agreements with the NMDU. [26] In the event that the revised list shows that employees who bid for the buyouts had their bids rejected because of their placement on the old list, but whose bids should have been accepted based on a revised list, the Union should request the New York to pay these employees the $100,000. If the request is not accepted by the New York Times, then the Union should make whole, with interest, any employee whose buyout bid should have been accepted based on unit seniority with City and Suburban.

With respect to those former C&S employees who were hired by the New York Times it is recommended that the Union request that the Times revise their seniority so that within this group of employees, their relative seniority *vis a vis* each other reflects their unit seniority when they were employed by City and Suburban and not by their union seniority or by the amount of time they worked for other NMDU signatory employers.

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[25] The charges do not allege that the current contract between the Union and the New Times is illegal insofar as the Group 2 preference is concerned and I shall therefore not recommend that the Board nullify that clause. However, since the same clause exists in the New York Times collective bargaining agreement, it would be advisable, if this opinion is sustained, for that employer and the Union to voluntarily modify its contract in this regard.

[26] Any revision of this list should be reviewed and approved by the General Counsel and any documents and/or records necessary to determine the proper placement of City and Suburban employees on this list should be provided to the extent not already in the possession of the General Counsel.

With respect to Mr. Altieri, it is recommended that the Union notify him in writing that it will not seek to prevent him from being employed by any employers because of his failure to pay dues while he was employed at City and Suburban. Of course, if he is or becomes employed by an employer having a collective bargaining agreement that contains a valid union security clause, he may be required to pay the period dues that are normally required of members if he chooses to join, or the periodic agency fees that are required of members as a condition of employment.

Where a make whole remedy is appropriate, backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [27]

**ORDER**

The Respondent, the Newspaper and Mil Deliverers' Union of New York and Vicinity, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Giving effect to or enforcing *any* collective bargaining agreements or *any* other agreements that it has or had with City and Suburban, the New York Post or the New York Times which in any way gives preferences to one group of employees over another group of employees based either on their length of time as union members or on the amount of time that they have been employed by companies having contracts with the NMDU other than the companies by whom they are employed.

(b) Causing or attempting to cause the New York Post to prevent the promotion of individuals from Group 3 to Group 1 status in order to give preference to other individuals based on their length of time as union members or based on their time employed by NMDU signatory companies other than the New York Post.

(c) Failing to give employees proper and timely notice that they are entitled to refrain from becoming union members.

(d) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) No longer enforce or implement any contract or agreement with the New York Post that in any way gives preferences to one group of employees over another group of employees based either on their length of time as union members or on the amount of time that they have been employed by companies having contracts with the NMDU other than the New York Post.

(b) Request the New York Post that a revision of seniority be made for those employees who were hired from City and Suburban so that this set of employees be given seniority standing only from the date of their employment at the Post and further revise any seniority lists so that other New York Post employees who have worked longer at the Post be given greater seniority status either as Regular Situation Holders or as Group 1 extras.

(c) Make whole with interest, any employees of the Post who have suffered by reason of the discrimination against them in the manner set forth in the Remedy section of this Decision

(d) Notify, in writing, all bargaining unit members of the New York Post or the New York Times of their right to refrain from becoming members in the Union.

(e) Revise the list used to allow former employees of City and Suburban to make a bid for either a buyout or employment at the New York Times. This revision will order “seniority” by the length of time that these employees have worked for City and Suburban or its immediate predecessors and will not be based on the length of time that the former City and Suburban employees have been either union members or on the length of time that these employees have worked for other NMDU signatory employers. In the event that one or more employees who bid for the buyouts should have had their bids accepted under such revised list, the Union should request the New York Times to pay each of them $100,000. In the event that this request is unsuccessful, then the Union will make these employees whole with interest.

(f) Request the New York Times to revise the seniority status of those employees it hired who had previously been employed by City Suburban to reflect their relative seniority vis a vis each other, based solely on their unit seniority with City and Suburban.

(g) Notify Daniel Altieri that the Union will not cause or attempt to cause any employer to refuse to give him employment because of his failure to pay union dues when he was employed at City and Suburban.

(h) Post at its office copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and/or members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the required revisions to the various seniority lists involved in these cases and to determine, if necessary, the amount of any backpay due under the terms of this Order.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2012

_____
Raymond P. Green
Administrative Law Judge

## Appendix A

## Corrections to the record

| Page | Line(s) | Transcript reads | Should read |
|---|---|---|---|
| 101 | 2 | accurate representation | inaccurate representation |
| 147 | 6 | Light | |
| 154 | 22 | Orientation | *Not sure* |
| 172 | 1 | NYU | MOU |
| 188 | 15 | New York Times | New York Post |
| 263 | 12 | Elbiarea | El Diario |
| 263 | 12 | Fisherman | *Not sure* |
| 263 | 16 | New York | Newark |
| 263 | 20 | OG | Oggi |
| 283 | 25 | Newest Day | Newsday |
| 284 | 11 | Newest Day | Newsday |
| 305 | 4 | MLU | MOU |
| 325 | 4 | "RICHGEL" | "RINGEL" |
| 329-320 | Various | "Ms. Fleming" | "Ms. Ringel" |
| 346 | 6 | Governnient | Gutterman |
| 352 | 9 | IBS | IDS |
| 356 | 16 | reached | Made |
| 357 | 4, 14, etc. | Minocqua | Moonachie |
| 359 | *15* | Miller Show | New Rochelle |
| 361 | 25 | For what purposes does used in the shops? | For what purposes was seniority used in the shops? |
| 362 | 6 | industry work | industry-wide |
| 372 | 11 | Mr. Silverman | "The Witness" or "Mr. Biegner" |
| 379 | 11 | reporters | Employers |
| 380 | 22 | Mr. Silvennan | "The Witness" or "Mr. Biegner" |
| 383 | 11 | Betterman | Gutterman |
| 383 | 21 | Rockwell Gran Gregorio | Rocco Giangregorio |
| 383 | 22-23 | G.N.Gregorio | Rocco Giangregorio |
| 419 | 24 | half assed | half-asked |
| 469 | 8-9 | Dario | El Diario |
| 489 | 8 | Ballantine and Park | Valentin and Clark |
| 490 | 8 | artist stage | RSH |
| 498 | 9 | artists' pages | RSHs |
| 501 | *15* | non-priority | non-member |
| *501* | 20 | PR | card |
| 513 | 11 | afforded | sorted |
| 516 | 1 | if they had a fight | isn't it a fact |
| 519 | 17 | Beg | Beck |
| 521 | 8 | 2010 | 2009 |
| 532 | 25 | Beg | Beck |
| 546 | 11 | "Agency Demands" (re: GC-7 1) | “Agency Fee” |
| 600 | 8 “ | grown-up" | "blown-up" |
| 601 | 11 | 2-NLRB-870 | 332 NLRB 870 |
| 603 | 9,20 | Nutley | Moonachie |

| | | | |
|---|---|---|---|
| 604 | 14 | Nutley | Moonachie |
| 609 | 23 | Nutley | Moonachie |
| 626 | 10 | Menocke | Moonachie |
| 653- | (throughout Grados test) | MS. RINGEL | MS. FLEMING |
| 806 | 15 | LD Aerio | El Diario |
| 809 | 22 | Drove | Joined |
| 831 | 6 | MS. RINGEL | MS. OSBORN |
| 832 | 13,15 | MS. RINGEL | MS. OSBORN |
| 864 | 18 | 2268 | 22681 |

## APPENDIX B

## NOTICE TO EMPLOYEES AND MEMBERS

### Posted by Order of the
### National Labor Relations Board
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

**WE WILL NOT** give effect to or enforce *any* collective bargaining agreements or *any* other agreements with City and Suburban, the New York Post or the New York Times which in any way gives preferences to one group of employees over another group of employees based either on their length of time as union members or on the amount of time that they have been employed by companies having contracts with the NMDU other than the companies by whom they are employed.

**WE WILL NOT** cause or attempt to cause the New York Post to prevent the promotion of individuals from Group 3 to Group 1 status in order to give preference to other individuals based on their length of time as union members or based on their time employed by NMDU signatory companies other than the New York Post.

**WE WILL NOT** fail to give employees proper and timely notice that they are entitled to refrain from becoming union members.

**WE WILL NOT** on any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

**WE WILL** no longer enforce or implement any contract or agreement with the New York Post that in any way gives preferences to one group of employees over another group of employees based either on their length of time as union members or on the amount of time that they have been employed by companies having contracts with the NMDU other than the New York Post.

**WE WILL** request the New York Post to make a revision of seniority for those employees who were hired from City and Suburban so that this set of employees be given seniority standing only from the date of their employment at the New York Post and further revise any seniority lists so that other New York Post employees who have worked longer at the Post be given greater seniority status either as Regular Situation Holders or as Group 1 extras.

**WE WILL** make whole with interest, any employees of the New York Post who have suffered by reason of the discrimination against them.

**WE WILL** notify, in writing, all bargaining unit members of the New York Post and the New York Times of their right to refrain from becoming members in the Union.

**WE WILL** revise the list used to allow former employees of City and Suburban to make bids for either a buyout or employment at the New York Times. This revision will order "seniority" by the length of time that these employees have worked for City and Suburban or its immediate predecessors and will not be based on the length of time that the former City and Suburban employees have been either union members or on the length of time that these employees have worked for other NMDU signatory employers. In the event that one or more employees who had bid for the buyouts should have had their bids accepted under such a revised list, we will request the New York Times to pay them each $100,000. In the event that this request is unsuccessful, then we will make these employees whole with interest.

**WE WILL** request the New York Times to revise the seniority status of those employees it hired who had previously been employed by City Suburban to reflect their relative seniority vis a vis each other, based solely on their unit seniority with City and Suburban.

**WE WILL** notify Daniel Altieri that we will not cause or attempt to cause any employer to refuse to give him employment because of his failure to pay union dues when he was employed at City and Suburban.

**Newspaper and Mail Deliverers' Union of New York and Vicinity**
**(Union)**

**Dated** _____ **By** _____
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.